NO. 50114-7-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON DIVISION TWO

STATE OF WASHINGTON
v.
JAYNE BLUNK

ON APPEAL FROM
THE SUPERIOR COURT FOR
GRAYS HARBOR COUNTY
STATE OF WASHINGTON

The Honorable David L. Edwards, Judge

APPELLANT'S OPENING BRIEF

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RULES, STATUTES, AND OTHERS

A. ASSIGNMENTS OF ERROR

1. The trial court erred in finding that Ms. Blunk made a knowing, voluntary and intelligent decision to waive her right to a jury trial.

2. The trial court erred in finding that Ms. Blunk made a voluntary decision to stipulate to facts for a stipulated trial, without also determining that the decision was also knowing and intelligent.

3. The trial court erred in finding and concluding that the police had probable cause to arrest Ms. Blunk.

4. The trial court erred in finding and concluding that Ms. Blunk's *Miranda* rights were not violated.

5. Ms. Blunk assigns error to the trial courts findings that she did not challenge the validity of the no contact orders.

Issues Presented on Appeal

1. Did the trial court err in finding that Ms. Blunk made a knowing, voluntary and intelligent decision to waive her right to a jury trial, where she has mental disabilities, she expressed confusion, and the trial court did not engage in a meaningful colloquy?

2. Did the trial court err in finding that Ms. Blunk made a knowing, voluntary and intelligent decision to enter into a stipulated trial where she has mental disabilities, she expressed confusion, and the trial court did not engage in a meaningful colloquy?

3. Did the police have probable cause to arrest Ms. Blunk for violation of a no contact order they knew she had not signed?

4. Did the trial court err in entering a finding that Ms. Blunk did not challenge the validity of the no contact orders where she submitted to the court that she had never signed or been served a copy of the orders and the court conducted a hearing on this issue?

B. STATEMENT OF THE CASE

Ms. Blunk was arrested after the police learned that Ms. Blunk had not signed a no-contact order prohibiting her from coming within 100 feet of a protected residence. RP 23-30; 35. Ms. Blunk never signed the order and the arresting officer knew that Ms. Blunk never signed the order, and did not know if Ms. Blunk had ever been properly served the no contact order. Id.

Nonetheless, the police arrested and searched Ms. Blunk for violation of a no contact order and discovered methamphetamines. CP 13-30, 35. Ms. Blunk was not charged with violation of a no-contact order.

a. Motion to Suppress.

Ms. Blunk moved to suppress the methamphetamine found in her pocket based on a lack of probable cause to arrest, and based on a lack of reasonable articulable suspicion that she was committing a crime. CP 9-10; 1RP 4 (March 8, 2016). Ms. Blunk challenged the officer's search as illegal based on the officer knowing prior to the arrest, that the no contact orders were unsigned, and the officer had no idea if they were served on Ms. Blunk CP 23-30, 35.

Ms. Blunk also challenged the admissibility of her statements to police. 1RP 6-7. The state argued that because Ms. Blunk was not formally arrested, *Miranda* did not apply. 1RP 6.

Early in the morning of December 1, 2016, Julie Roberts called the police to complain that Ms. Blunk might have been within a protected area, but was no longer. 1RP 9. Officer Ron Bradbury investigated the no contact orders, reviewed them "to see what the

verbiage was on the two orders" in Ms. Blunk's file and determined that there were two no contact orders against Ms. Blunk. 1RP 8-10, 16. Bradbury could see that the orders were unsigned and did not know if Ms. Blunk had been served copies of the orders. 1RP 16.

Later, on December 1, 2016, Bradbury received a call informing him that Ms. Blunk was approaching a prohibited residence. 1RP 8-9. After receiving a 911 dispatch, the police arrived on scene to look for Ms. Blunk. 1RP 12-13. As soon as the police located Ms. Blunk they informed her that they were investigating whether she was in violation of a no contact order, and informed her that she was in violation of the order, and arrested her. 1RP 15. Ms. Blunk stated that she forgot there were two orders. 1RP 15. With another officer presen,t Bradbury arrested Ms. Blunk and located methamphetamine during a search incident to arrest. 1RP 11, 16.

Ms. Blunk testified during the suppression hearing that she had never seen the no-contact order prohibiting her from being within 100 feet of 400 North F. Street. 1RP 22, 35. At the time of the arrest, Ms. Blunk was living at 324 1/2 North F. Street. 1RP 23.

On the Tuesday prior to her arrest, Ms. Blunk went to the

Aberdeen Police Department to inquire as to whether she could return to her home to get her money. 1RP 23. Two women working in the Police Department reviewed one of Ms. Blunk's protection orders and informed Ms. Blunk that she could go to her home. 1RP 23. Ms. Blunk informed the police employees that there were two orders, but the employees ignored Ms. Blunk and told her it was ok for her to go to her home. 1RP 24.

The trial court orally ruled, without evidence, that the no contact order, Exhibit 2, prohibiting Ms. Blunk from 400 North F. Street was personally served on Ms. Blunk. 1RP 35-36. The court also found that Ms. Blunk was not personally served and did not sign the order, but that Ms. Blunk was aware of the orders. 1RP 36-37. In its written order, the trial court erroneously concluded that Ms. Blunk's signature on the no contact order was not necessary for the police to have probable cause to arrest Ms. Blunk because she admitted that she had forgotten about the orders. CP 23-30.

During the suppression hearing, counsel reminded the trial court that Ms. Blunk asked the police if she was prohibited from going home and was misadvised that she was not prohibited. 1RP 5. The police department employees were mistaken because they

only examined one of two no contact orders and the no contact order the police failed to review, prohibited Ms. Blunk from going within 100 feet of her home. 1RP 5.

Counsel argued that there was no probable cause to arrest Ms. Blunk for being in the prohibited area because Ms. Blunk was unaware that she could not enter the area of her home, had not been served a copy of either no contact order, and had been misadvised by the police. 1RP 5-6. Counsel also argued that Ms. Blunk's custodial statements should have been suppressed. 1RP 5-6. The court ruled the statements admissible because they were pre-arrest and voluntary. 1RP 34. The court also ruled that the police had probable cause to arrest. CP 35.

b. Jury Trial Waiver.

The court determined that Ms. Blunk made a "voluntary" waiver of her right to jury trial based on the written waiver indicating that Ms. Blunk made a knowing, voluntary and intelligent waiver of her right to a 12 person jury, and based on counsel informing the court that he believed that the court had discussed the waiver in a prior hearing. RP 4; CP 7. In court, Ms. Blunk expressed confusion about the waiver. RP 6-10.

c. Stipulated Trial.

When the trial court asked Ms. Blunk if she was going to stipulate to the court reading the police reports to determine guilt or innocence, Ms. Bunk responded that she had not read the reports or the jury trial waiver. RP 4-5. After a brief recess where the defense counsel and Ms. Blunk discussed the stipulation and jury trial waiver, Ms. Blunk expressed confusion. RP 7-8. When the court asked if Ms. Blunk understood the stipulation, she stated that she had not read the police reports and, “I don't know what he is asking.“ RP 7-8.

Defense counsel explained that Ms. Blunk was confused. RP 8. When the trial court asked Ms. Blunk what she believed would occur if she entered into a stipulated trial, she indicated “I understand that I am going to be convicted of possession of methamphetamine.“ RP 8. The court explained that Ms. Blunk retained the right to appeal and then asked if she understood the stipulated trial, to which Ms. Bunk indicated “yes”, even though she stated that she did not understand and was confused. RP 7-10. Ms. Blunk asked her attorney to inform the court that she has mental disabilities. RP 10; CP 28.

Prior to the stipulated trial, the court also explained that Ms. Blunk was "not stipulating to the truth and accuracy of the police reports", but allowing the court to review the facts to determine guilt or innocence. RP 7.

The colloquy is as follows:

> THE COURT: All right. Thank you. Did you sign these documents that I have in front of me, voluntarily?
>
> THE DEFENDANT: Yes, I did.
>
> THE COURT: Okay. Do you have any questions you want to ask me about what this statement of defendant on submission of case, on stipulation of facts means?
>
> THE DEFENDANT: **I don't know what he is asking.**
>
> THE COURT: Pardon me?
>
> MR. NAGLE: **That piece of paper you just signed -- Your Honor, she wanted me to point out that she does have some mental disabilities. The piece of paper you just signed is –**
>
> THE COURT: Do you have any questions you want to ask me about this document I am showing you?
>
> THE DEFENDANT: No

(Emphasis added) RP 9.

The trial court reviewed the "stipulated facts" and determined that Ms. Blunk was guilty of possession of methamphetamine. RP 10.

In relevant part, the trial court entered findings and conclusions and an order following the stipulated trial indicating:

> that the Gray's County Superior Court entered a valid order for protection prohibiting Ms. Blunk from coming within 100 feet of 400 ½ North F St. Aberdeen, WA.; 2. The police observed Ms. Blunk next door to 400 North F St. at 324 N. F. Street; 3. The police determined that 324 North F St. was within 100 feet of 400 North F St. and arrested Ms. Blunk for violation of the no contact order.

CP 23-30. Pursuant to the search, the police found methamphetamine. Id.

The court also entered findings that Ms. Blunk did not sign an order for protection issued against her; the order was determined "valid" by a police dispatch check; Ms. Blunk stated that she was "aware of the existence of two orders" but she "forgot there were two orders", and entered a finding that the police had probable cause even though they knew the orders were not signed by Ms. Blunk, and they did not have any evidence that the order was properly served. CP 23-30, 35.

The trial court provided in its order:

> I conclude that a reasonable person would believe that a violation of the vulnerable adult protection order was committed by Ms. Blunk because she admitted she was aware of the order, the order was "confirmed" as valid, and she was within one hundred feet of the protected person's residence. Her signature on the order or personal service of the order on Ms. Blunk is not required to establish probable cause to believe she had knowledge of the order.

CP 31-33.

Ms. Blunk was only charged with possession of methamphetamine. CP 1-2, 30-35. This timely appeal follows. CP 46.

C. ARGUMENTS

1. JANE BLUNK WAS DENIED DUE PROCESS BY THE COURT PERMITTING A JURY TRIAL WAIVER AND STIPULATED TRIAL THAT MS. BLUNK WAS UNABLE TO ENTER INTO KNOWING, VOLUNTARILY AND INTELLIGENTLY.

Ms. Bunk did not make a knowing, voluntary and intelligent decision to waive her right to a jury trial or to enter into a stipulated facts trial.

a. Jury Trial Waiver.

This Court reviews the validity of a defendant's jury trial waiver de novo. *State v. Ramirez-Dominquez*, 140 Wn. App. 233, 239, 165 P.3d 391 (2005). A criminal defendant in superior court has the constitutional right to a jury trial. Wash, Const. art. I, § 21; CrR 6.1(b); *State v. Stegall*, 124 Wn.2d 718, 723, 881 P.2d 979 (1994). A criminal defendant may only waive this right, if the waiver is knowing, voluntary and intelligent. *City of Bellevue v. Acrey,* 103 Wn.2d 203, 207, 691 P.2d 957 (1984); *State v. Castillo-Murcia,* 188 Wn. App. 539, 547, 354 P.3d 932 (2015), *review denied*, 184 Wn.2d 1027, 364 P.3d 120 (2016); *State v. Pierce*, 134 Wn. App. 763, 771, 142 P.3d 610 (2006). "The waiver must either be in writing, or done orally on the record." *State v. Treat*, 109 Wn. App. 419, 427, 35 P.3d 1192 (2001). A colloquy or on-the-record advice of the waiver's consequences is not required so long as the waiver is a "personal expression" from the defendant; a waiver by defendant's lawyer on the defendant's behalf is not sufficient. *Stegall*, 124 Wn.2d at 725.

The state bears the burden of establishing the validity of the defendant's jury trial waiver, and the Courts indulge every

reasonable presumption against such waiver, absent a sufficient record. *State v. Hos*, 154 Wn. App. 238, 249-50, 225 P.3d 389 (2010). "The validity of any waiver of a constitutional right, as well as the inquiry required by the court to establish waiver, [depends] on the circumstances of each case, including the defendant's experience and capabilities." *Stegall*, 124 Wn.2d at 725. The Courts do not require that a defendant "be apprised of every aspect of the jury trial right in order for the defendant's waiver to be valid." *State v. Benitez*, 175 Wn. App. 116, 129, 302 P.3d 877 (2013).

In *Stegall*, the Supreme Court held that a waiver of the right to a 12–person jury is constitutionally valid only if the defendant makes a personal statement agreeing to the waiver or there is "an indication that the trial judge or defense counsel discussed the issue with the defendant prior to the attorney's own waiver." *Stegall,* 124 Wn.2d at 728-29. In *Stegall*, the court reversed the waiver because the record did not demonstrate either a personal statement of waiver or an "informed acquiescence" in counsel's waiver. *Stegall*, 124 Wn.2d at 731.

Here, too Ms. Blunk did not demonstrate an informed acquiescence. Rather she was confused and seemed unable to

comprehend that she was waiving her right to a jury trial. RP 7-9. The court did not explain the waiver and the only information regarding the waiver came from counsel who explained that Ms. Blunk was confused, she had mental disabilities, and counsel believed that a different court had discussed the waiver at a different time. RP 6-10. These facts are insufficient to establish that the "trial judge or defense counsel ... discussed the issue with the defendant prior to the attorney's own waiver." *Stegall*, 124 Wn.2d at 728-29. Counsel believed another court discussed the waiver but he did not know this to be true. Nor did the court have any idea of prior discussions regarding the jury trial waiver.

The trial court erred in accepting the waiver in light of Ms. Blunk's confusion and the lack of a discussion of the nature and meaning of the waiver. Accordingly, this Court should reverse and remand for a new hearing to determine if the waiver was knowing, voluntary and intelligent.

b. Stipulated Trial.

Due process does not require the trial court to ensure that a defendant understands the rights waived by a factual stipulation as long as the stipulation is not tantamount to a guilty plea. *In re*

Detention of Moore, 167 Wn.2d 113, 121, 216 P.3d 1015 (2009); *State v. Johnson*, 104 Wn.2d 338, 342-43, 705 P.2d 773 (1985). However, a person who does not understand a proceeding cannot make a knowing, voluntary and intelligent decision to enter into a stipulated trial. In *State v. Neff*, 163 Wn.2d 453, 460-61, 181 P.3d 819 (2008). Appellate courts "have no preference for enforcing a waiver of a constitutional right if the defendant fails to understand his waiver and its consequences." Id.

In *Johnson,* the Court held that "because a stipulation of facts trial is substantively different from a guilty plea proceeding, a defendant ... need not be advised of his constitutional rights." *Johnson*, 104 Wn.2d 338, 342. Here Ms. Blunk believed she was in essence pleading guilty. RP 8. "I understand that I am going to be convicted of possession of methamphetamine." RP 8.

In *Johnson* there was no issue or concern with Johnson not understanding the proceedings or confusing the stipulation with a guilty plea, rather Johnson argued unsuccessfully that the trial court should have engaged in a more in depth colloquy regarding the voluntariness of his waiver and stipulation. *Johnson,* 104 Wn.2d at 340-32.

Unlike in *Johnson,* Ms. Blunk believed that she was essentially pleading guilty but retaining her right to appeal the issue of probable cause to arrest. RP 7-8. Ms. Blunk did not understand the nature of the stipulated facts trial. RP 7-8. When asked if she wanted to enter into a stipulated trial, Ms. Blunk stated “I don't know what he is asking“ and “I understand that I am going to be convicted of possession of methamphetamine.“ RP 8-9.

In *Neff*, the defendant like Ms. Bunk entered into a stipulated trial but believed he was pleading guilty and reserving the right to appeal. *Neff*, 163 Wn.2d at 460. Neff, like Ms. Blunk also signed a stipulated facts agreement and trial counsel in both cases asserted that they read the stipulation to the defendants. Id. The relevant proceeding indicated that Neff was confused.

> The colloquy with the judge further clouded the issue. When he asked Neff's understanding of the agreement for a stipulated trial, Neff said he was “making a plea deal with the prosecutor,” which he was not. 3 RP (Nov. 25, 2003) at 220. The judge tried to correct this statement and clarify Neff's understanding. Neff's counsel responded, “I read every word on that document.... [Neff] appeared to be reading along with me. However, sometimes these things can be so complicated, so if Mr. Neff is not able to accurately answer your question, I can certainly explain it.” *Id.* at 221.

Id. The Supreme Court held that these "are not facts establishing a knowing waiver of a constitutional right." Id. Here, Blunk like Neff was confused, and counsel's assertions that he read everything to Ms. Blunk, did not demonstrate that Ms. Blunk understood the stipulation and waiver.

Ms. Blunk believed that her stipulated trial was tantamount to a guilty plea. Ms. Blunk did not understand that the stipulated trial was not tantamount to a guilty plea. Id. Ms. Blunk was confused, did not understand the court's questions and did not understand the nature of the rights she was waiving. The facts did not support a finding of a knowing, voluntary and intelligent decision to enter into a stipulated trial and the trial court did not make any findings other than Ms. Blunk signed the agreement "voluntarily", and the stipulated trial pleading indicated in the "certificate of defendant" that she made the stipulation "freely and voluntarily'. CP 32; RP 9.

In spite of the pleading indicating with boilerplate language that Ms. Blunk was entering into the stipulation "freely and voluntarily", the record, similar to *Neff*, does not support this language because Ms. Blunk, like Neff, was confused. RP 9. After Ms. Blunk stated that she did not understand the court's question

regarding waiver and stipulation, she asked counsel to explain to the court that she has “mental disabilities”. RP 9.

Rather, than inquire into Ms. Blunk’s understanding of the proceedings, the court asked, “Do you have any questions you want to ask me about this document I am showing you?” RP 9. The court seemed to ignore Ms. Blunk’s confusion and did not inquire into her mental disabilities or her understanding of the proceedings. This process violated Ms. Blunk’s due process rights. *Neff*, 163 Wn.2d at 461; *Johnson*, 104 Wn.2d at 343.

2. THE TRIAL COURT ERRED IN REFUSING TO SUPPRESS EVIDENCE OBTAINED BY AN ILLEGAL DETENTION AND ARREST.

The police did not have reasonable articulable suspicion or probable cause to arrest and search Ms. Blunk because prior to the arrest, Officer Bradbury reviewed the no contact orders and was able to see that they were not signed by Ms. Blunk and admitted that he did not know if Ms. Blunk had ever seen orders. 1RP 8-10, 16. The arrest and subsequent search were illegal.

Only, a certified copy of a no contact order containing the signature of the defendant is sufficient evidence to establish

knowledge. *State v. France*, 129 Wn. App. 907, 911, 120 P.3d 654 (2005). Here, the court's order denying suppression erroneously concluded that even though the police knew that Ms. Blunk had not singed the no-contact orders, the police had probable cause because the unsigned orders were sufficient with Ms. Blunk's statements that she forgot about the orders. CP 25, 35. The court also erroneously found that Ms. Blunk did not challenge the validity of the no contact order. Id.

During the motion to suppress, Ms. Blunk expressly challenged the validity of the no-contact order. 1RP 4 This Court reviews a trial court's denial of a suppression motion to determine whether substantial evidence supports the challenged findings of fact and whether these findings support the trial court's conclusions of law. *State v. Mendez*, 137 Wn.2d 208, 214, 970 P.2d 722 (1999) (*overruled on other grounds by Brendin v. California,* 551 U.S. 249, 127 S.Ct. 2400, 168 L.Ed.2d 132 (2007)).

"Probable cause exists when an officer has reasonable grounds to believe a suspect has committed or is committing a crime based on circumstances sufficiently strong to warrant that conclusion." *State v. Gonzales*, 46 Wn. App. 388, 395, 731 P.2d

1101 (1986). This determination rests “on the totality of facts and circumstances within the officer’s knowledge at the time of the arrest.” *State v. Fricks*, 91 Wn.2d 391, 398, 588 P.2d 1328 (1979). Officers may detain and arrest a suspect even though the arresting officers did not subjectively believe they had probable cause, so long as probable cause in fact existed to do so. *State v. Moore*, 161 Wn.2d 880, 888, 169 P.3d 469 (2007). There was no probable cause in this case because the no-contact orders were not valid, and Ms. Blunk was never charged with violating these orders.

In circumstances where police officers act together as a unit, the “fellow officer” rule provides that the collective knowledge of all the officers involved in the arrest may be considered in determining whether probable cause existed. *State v. Nall*, 117 Wn. App. 647, 650, 72 P.3d 200 (2003). The fellow officer rule does not require a finding of probable cause to be based solely upon the personal or subjective knowledge of the arresting officer. *State v. Maesse,* 29 Wn. App. 642, 647, 629 P.2d 1349 (agreeing that “in those circumstances where police officers are acting together as a unit, cumulative knowledge of all the officers involved in the arrest may be considered in deciding whether there was probable cause to

apprehend a particular suspect"), *review denied,* 96 Wn.2d 1009 (1981).

In the instant case, the trial court incorrectly concluded that probable cause existed because at all times, the arresting officer knew that the no contact order was unsigned and he did not know if the order had been properly served on Ms. Blunk, and her general awareness of the existence of the orders did not make the orders valid. *France*, 129 Wn. App. at 911. "[W]ere a warrantless search or seizure is challenged, the prosecution bears the burden of proof." *State v. Mance*, 82 Wn. App. 539, 544, 918 P.2d 527 (1996). Also, probable cause cannot be supported by information police gain *following* an arrest. *Mance*, 82 Wn. App. at 542.

Mance, is legally on point. In *Mance,* the police relied on a "hot sheet" that through police error listed a car as stolen when in fact, the police had been notified that the car was not stolen *Mance*, 82 Wn. App. at 542. This Court held "police may not rely upon incorrect or incomplete information *when they ... are at fault in permitting the records to remain uncorrected.*" *Mance,* 82 Wn.2d at 543 (quoting 2 Wayne LaFave, Search and Seizure, section 3.5(d), at 272 (3rd ed. 1996)) (emphasis added by *Mance* court).

The Court reversed the conviction and suppressed the narcotics retrieved incident to the illegal arrest without probable cause because the state failed to meet its burden to prove that its reliance on the hot sheet was justified. *Mance,* 82 Wn.2d at 544.

Similarly, in *Nall*, the defendant was arrested on an invalid Oregon warrant that a judge erroneously failed to quash. *Nall*, 117 Wn. App. at 651. The state unsuccessfully argued that the police could arrest based on a "good faith exception" to probable cause under RCW 10.88.330 which provides:

> The arrest of a person may be lawfully made also by any peace officer or a private person, without a warrant upon reasonable information that the accused stands charged in the courts of a state with a crime punishable by death or imprisonment for a term exceeding one year.

Id.

This Court held that under art. 1, § 7 of the Washington State Constitution, there is no "good faith" exception to the valid warrant requirement. *Nall*, 117 Wn. App. at 651 (quoting *State v. Werner*, 129 Wn.2d 485, 496 n. 4, 918 P.2d 916 (1996)).

Nall and *Mance* provide this Court with authority to reverse Blunk's conviction and remand for suppression of the

methamphetamine. In *Mance,* under the fellow officer rule, the police knew that the "hot sheet" was incorrect. In *Nall*, the police were imputed with knowing that the Oregon warrant was invalid. Here, Bradbury, the arresting officer, examined the no contact orders, and knew that they were unsigned and therefore invalid.

When examining the "totality of facts and circumstances within the officer's knowledge at the time of the arrest", the police knew they could not arrest Ms. Blunk for violation of a no contact order. *Moore,* 161 Wn.2d at 888; *Fricks*, 91 Wn.2d at 398. Accordingly, the evidence did not support the findings, and the findings do not support the conclusions. In sum, the trial court's conclusion of law that the police had probable cause to arrest is incorrect and must be reversed, and the evidence suppressed.

3. MS. BLUNK WAS DENIED HER CONSTITUTIONAL RIGHT TO BE FREE FROM CUSTODIAL INTERROGATION WITHOUT A PRIOR ADMONISHMENT OF RIGHTS UNDER MIRANDA v. ARIZONA.[1]

Ms. Blunk was detained and interrogated without being provided *Miranda* warnings.

[1] *Miranda v. Arizona*, 384 U.S. 436, 16 L.Ed.2d 694, 86 S.Ct. 1602 (1966).

The Fifth Amendment right to *Miranda* warnings attach only when a custodial interrogation begins. *State v. Templeton*, 148 Wn.2d 193, 208, 59 P.3d 632 (2002). An investigative encounter with a suspect based on reasonable suspicion not amounting to probable cause does not require *Miranda* warnings. *France*, 121 Wn. App. at 499. But when a person is in custody, there arises a presumption that any responses to police questions are not voluntary. *State v. Sargent*, 111 Wn.2d 641, 648, 762 P.2d 1127 (1988), *citing, Minnesota v. Murphy*, 465 U.S. 420, 429, 104 S.Ct. 1136, 79 L.Ed.2d 409 (1984).

Custody begins "when the investigative process becomes accusatorial and the need for warnings is triggered at the moment the inquiry 'focuses' on an accused in custody and the questioning is intended to elicit incriminating statements." *State v. Dennis*, 16 Wn. App. 417, 421, 558 P.2d 297 (1976), *review denied,* 96 Wn.2d 1020 (1981), *citing, Escobedo v. Illinois*, 378 U.S. 478, 84 S.Ct. 1758, 12 L.Ed.2d 977 (1964). This Court reviews de novo the trial court's determination of a custodial interrogation. *France*, 121 Wn. App. at 399.

Here, the police began their inquiry with Ms. Blunk by

accusing her of being in violation of a no contact order. 1RP 15.

The Court in *Miranda*, refined and restated the above stated rule from *Escobedo. Dennis*, 16 Wn. App. at 421. “Self-incriminating statements obtained from an individual in custody are presumed to be involuntary, and to violate the Fifth Amendment, unless the State can show that they were preceded by a knowing and voluntary waiver of the privilege." *Sargent*, 111 Wn.2d at 648. When a suspect is in custody, the police or state agents must give the *Miranda* warnings before the commencement of any questioning. *State v. Warner*, 125 Wn.2d 876, 884, 889 P.2d 479 (1995); *State v. Walton*, 64 Wn. App. 410, 413, 824 P.2d 533 (1992), *review denied*, 119 Wn.2d 1011, 833 P.2d 386 (1992) (*citing, Miranda*, 384 U.S. at 444).

At issue in the instant case is whether Ms. Blunk’s statements were in response to a custodial interrogation. These are factual questions that are reviewed de novo. *In re Cross*, 180 Wn.2d 664, 682, 327 P.3d 660 (2014). For an interrogation to be "custodial," the suspect must be "taken into custody or otherwise deprived of his freedom of action in a significant way." *State v. McWatters*, 53 Wn. App. 911, 915, 822 P.2d 787 (1992). A

suspect's freedom of action is curtailed when the circumstances resemble a formal arrest. *State v. Harris*, 106 Wn.2d 784, 789, 725 P.2d 975 (1986) (*citing Berkemer v. McCarty*, 468 U.S. 420, 104 S.Ct. 3138, 3151, 82 L.Ed.2d 317 (1984)). For purposes of determining whether a suspect is in custody or otherwise deprived of his freedom of action in a significant way, the sole inquiry is "'whether the suspect reasonably supposed his freedom of action was curtailed.'" *McWatters,* 63 Wn. App. at 915, *quoting, State v. Short,* 113 Wn.2d 35, 41, 775 P.2d 458 (1989).

A custodial interrogation involves "express questioning" or its "functional equivalent", when initiated by law enforcement officers after a person's freedom to leave is significantly curtailed. *State v. Hawkins*, 27 Wn. App. 78, 81-82, 615 P.2d 1327 (1980). The "functional equivalent" of express police questioning under *Miranda*, includes "any words or actions on the part of police which they should know are reasonably likely to elicit an incriminating response from the suspect." *Walton,* 64 Wn. App. at 414, *citing, Rhode Island v. Innis*, 446 U.S. 291, 301, 100 S.Ct. 1682, 64 L.Ed.2d 297 (1980); *Sargent*, 111 Wn.2d at 650; *Hawkins*, 27 Wn. App. at 82.

"'Interrogation' involves some degree of compulsion." *Warner*, 125 Wn.2d at 884. The subjective perception of the suspect and the nature of the question, rather than the procedure during which the question is asked or the intent of the police, are determinative of the issue of interrogation. *Sargent,* 111 Wn.2d at 650; *Walton*, 64 Wn. App. at 414.

Generally, requests for routine information necessary for identification purposes is not interrogation. *Walton*, 64 Wn. App. at 414. However, "[a] question which is not required for booking purposes is 'interrogation' for *Miranda* purposes." *Walton*, 64 Wn. App. at 413-414. In *Walton,* the defendant was merely asked identification questions during the booking process.

Here, two police officers accused MS. Blunk of violating a no-contact order and arrested Ms. Blunk for violation of a no contact order. Ms. Blunk was not advised of her *Miranda* rights and in response to the police informing her that she was in violation of the no contact order, she stated that she had forgotten about the order. CP 23-30.

In *France*, the Court held that the encounter with France on the street was accusatory and not just investigatory because the

police were alerted to a report that France had committed domestic violence, the police knew France from prior domestic violence arrests and the police told France the police needed to "clear it up" before France would be free to leave. *France*, 121 Wn. App. at 399-400.

This case is closely analogous to *France*. Here, the protected party of one of the no contact orders called the police to inform them that Blunk was in violation of an order. 1RP 8-10, 16. The police knew that the court had issued two no-contact orders that were not signed by Ms. Blunk and believed that she was within the prohibited area. 1RP 8-10, 16. The police nonetheless, detained Ms. Blunk as soon as they observed her within the prohibited area, arrested her, informed her that they were investigating her violation of a no contact order, and informed her that she was in violation of the order. 1RP 15. Prior to the arrest, Bradbury, reviewed the orders and knew that they were invalid because they were unsigned by Ms. Blunk. 1RP 8-10, 16.

This information, like that in *France*, spurred an accusatory approach, not an innocent investigatory approach. While the police did not inform Ms. Blunk that she would need to remain until the

matter was cleared up, two officers confronted her and the police immediately arrested her and informed her that she was in violation of the no contact order. 1RP 8-10, 16. *France* is legally indistinguishable because Ms. Blunk like France without *Miranda* warnings, was detained and accused of committing a crime in the presence of two officers, where she would not have felt free to leave. Had the police provided *Miranda* warnings as required, Ms. Blunk could have immediately exercised her right to remain silent.

The instant case is also similar to *Dennis*, 16 Wn. App. 417. In *Dennis*, the issue was custody, where officer entered the defendant's home with permission and advised him that he knew the drugs were located in the refrigerator and suggested that the defendant voluntarily produce them in lieu of waiting for the search warrant, *Dennis*, 16 Wn. App. at 421-22.

The Court in *Dennis* held that even though the defendant was not placed under arrest, the defendant's response to the police officer should have been suppressed because the "atmosphere was nevertheless dominated by the officer's unwelcome presence and his insistence on remaining in a position where he could monitor and restrict the occupants' freedom of movement within

their home." *Dennis,* 16 Wn. App. at 421-422, 424.

In the instant case, as in *France* and *Dennis*, Bradbury initiated contact with Ms. Blunk by stating that he was investigating her violation of a no contact order and by informing her that she was in violation of a no contact order and under arrest. Ms. Blunk may not have been under formal arrest for a brief moment before the actual arrest, but at all times, she was accused of violating the no contact order, and her movement was immediately restricted by the presence of two officers. No one in Ms. Blunk's position would have felt free to leave, and the officer's accusation about the violation of the no contact order was designed to elicit a response about the alleged criminal activity in violation of *Miranda*. *Miranda* warnings should have been provided and in their absence, the statements should be suppressed, because the error in admitting the statements was not harmless.

A constitutional error is harmless only if the appellate court is convinced beyond a reasonable doubt that any reasonable jury would reach the same result absent the error, and the untainted evidence is so overwhelming that it necessarily leads to a finding of guilt. *State v. Easter,* 130 Wn.2d 228, 242, 922 P.2d 1285 (1996).

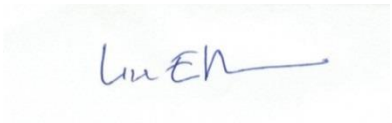
Here, Ms. Blunk was illegally arrested for violation of the no contact order the arresting officer knew was unsigned and could not be verified as valid. According to the court if Ms. Blunk had not indicated that she had forgotten about the two orders, the court would have suppressed the methamphetamine as the product of an unlawful search. Under these facts, the Court cannot conclude beyond a reasonable doubt that any reasonable court would have reached the same result absent the allegedly improper evidence. Thus, the error was not harmless and this Court should remand for suppression of the statement the court indicated supported probable cause and remand for dismissal with prejudice.

D. CONCLUSION

For the reasons provided herein, Jayne Blunk respectfully requests this Court reverse the trial court's findings, conclusions and orders on suppression and remand for dismissal with prejudice. Ms. Blunk also requests this Court direct that Ms. Blunk did not make a knowing, voluntary and intelligent decision to waive her right to a jury trial or to enter into a stipulated trial.

DATED this 14th day of November 2017.

Respectfully submitted,



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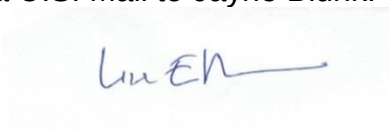
Attorney for Petitioner

I, Lise Ellner, a person over the age of 18 years of age, served the Grays Harbor County Prosecutor at appeals@co.grays-harbor.wa.us and Jayne Blunk, 324 1/2 North F. Street, Aberdeen, WA 98520 a true copy of the document to which this certificate is affixed, on November 14, 2017. Service was made electronically to the prosecutor and via U.S. Mail to Jayne Blunk.



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